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No. 92-359

In The

Supreme Court of the United States

October Term, 1992

KEENE CORPORATION,

Petitioner,

v.

LEONARD ADAMS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Circuit Court Of Monongalia County, West Virginia

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is proper for a jury to impose multiple punitive damage awards against a defendant who mass markets defective products for years after knowledge of the defect injuring thousands of victims when such awards further the applicable substantive state law.

2. Whether a jury award of punitive damages, reviewed and upheld by the trial court and the state appellate court, comports with due process when the defendant had the opportunity to present all relevant evidence and raised no issues warranting closer post-verdict scrutiny.

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RULES INVOLVED

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STATEMENT OF THE CASE

These asbestos personal injury cases were tried in a West Virginia state trial court under West Virginia law of products liability. In October/November of 1990, thirty-six cases were consolidated and tried in two courtrooms before the Honorable Larry V. Starcher and the Honorable Robert B. Stone against Petitioner Keene Corporation and one other defendant.

Following is a synopsis of the evidence offered by Plaintiffs/Respondents in support of their claim of punitive damages. The uncontradicted evidence at trial showed virtual universal recognition that asbestos products were dangerous in the 1930s. Testimony by John McAllister, a research chemist with Keene's predecessor, Baldwin-Ehret-Hill, showed that he knew of these hazards in the early 1950s and so informed his superiors. (McAllister Deposition at 65-69). Nonetheless, Keene never placed a label on its products until, at the earliest, 1966. Even this evidence of warnings was contradicted by testimony of workers as well as that of Keene's own retired president, Alvin Ehret. (Ehret Deposition at 91-96). Further, the purported warning noted only the dangers of excessive exposure, despite Keene's concession that it knew of the risks of low level exposure by 1964. (Keene's Petition for Appeal to the West Virginia Supreme Court of Appeals at 8). Indeed, Keene admitted

that a jury reasonably could have concluded that its duty to warn arose in 1955. (Keene's Petition for Appeal to the West Virginia Supreme Court of Appeals at 17).

The Courts instructed the juries on punitive damages as follows:

> The Court instructs the jury that in addition to compensatory damages, which if awarded are against a given defendant to compensate for actual injury, the law permits the jury under certain circumstances to award punitive damages against such defendant in order to punish such defendant or to deter others.
>
> The Court instructs the jury that under West Virginia law a defendant may be held liable for punitive damages in actions of tort such as this where the evidence reveals that a defendant in actions where punitive damages is sought was guilty of gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to civil obligations affecting the rights of others. Therefore, you are instructed that if you believe that either defendant corporation was guilty of gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to its civil obligations then you may award punitive damages against said defendant.
>
> The Court instructs the jury that punitive damages are awarded to punish a defendant and to deter others from pursuing a like course of conduct. The amount of punitive damages awarded, when considered together with compensatory damages, should be in such amount as the jury believes is sufficient to deter others from engaging in a like course of conduct.

> The Court instructs the jury that the fact that instructions have been given to you on the subject of damages should not be perceived by you as an intimation on the part of the Court that the defendant is or is not liable for the injuries and damages alleged. Such liability is to be determined solely by your own findings and from the evidence and the law as incorporated in these instructions.
>
> The Court instructs the jury that the mere fact that plaintiffs instituted this lawsuit against the defendants is not the slightest evidence of entitlement to recover a favorable verdict against any of them, nor does the filing of this lawsuit create any presumption favorable to plaintiffs or even a suspicion that any given one, or any of the defendants, may be liable to them.

(Judge's Charge to Jury, Nov. 8, 1990 at p. 13).

The two juries returned verdicts against Keene in thirty (30) out of the thirty-three (33) cases in which Keene remained a defendant. The amounts of the compensatory damages awarded by the juries varied with the extent of each Plaintiff's injuries, from $15,000 to $324,000. In nine (9) cases, the compensatory damages awarded were offset by settlements with other defendants.

The juries also awarded punitive damages. The jury in the group before Judge Starcher awarded punitive damages against Keene in the amount of $5,000 per Plaintiff and against the other defendant that went to verdict in the amount of $30,000 per Plaintiff. The jury in the group before Judge Stone awarded no punitives against

Keene, but awarded $250,000 per Plaintiff against the other defendant.

The statement of the case in Keene's Petition for a Writ of Certiorari is interesting in what it fails to state. Keene does not argue that there was insufficient evidence of punitive damages, or that the trial courts refused to permit it to introduce any evidence relevant to the issue of punitive damage, or that the courts below erred in permitting Plaintiffs to introduce their evidence of punitive damages. Indeed, the type of facts that might have been relevant to the jury's consideration or to the trial courts' post-trial review were saved for footnotes in the Petition for a Writ of Certiorari. Keene also does not complaint of any defect in the instructions to the jury.

In fact, Keene does not complain of any procedural deficiencies except that the issue of punitive damages should not have been submitted to the jury at all. The arguments set forth in Keene's Petition for a Writ of Certiorari, however, were set forth in its Motion to Strike Punitive Damages and post-trial motions, which were considered and denied by the trial courts.

After the trial courts entered judgments, Keene filed a Petition for Appeal in the Supreme Court of Appeals of the State of West Virginia on September 18, 1991, with the trial court record accompanying the Petition. (A-101). Plaintiffs filed a lengthy response. Under W.Va.R.A.P. 5, Keene, as the Petitioner, had an opportunity to make an oral presentation, but the Plaintiffs had no such opportunity. (Respondents' Appendix at 6). Upon consideration of the foregoing, the West Virginia Court refused the Petition for Appeal on May 13, 1992. (A-101 – A-102).

Thereafter, Keene filed a Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The major argument in the Petition for a Writ of Certiorari arising from a group of asbestos cases tried in a West Virginia state court is that multiple punitive damage awards against a defendant violates due process. This argument has been repeatedly rejected by this Court in cases raising precisely the same circumstances as the instant Petition.

In *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), this Court clearly stated that punitive damages are governed by state law. The purpose of punitive damages under West Virginia law are to punish the defendant, to deter others from engaging in similar conduct, to promote settlements, to provide additional compensation to the plaintiff, to encourage litigation and to substitute for personal revenge. When a company profits from the mass-marketing of defective products which cause injury and death to thousand of victims, the West Virginia courts have recognized the propriety of multiple punitive damage awards. *See Davis v. Celotex*, 1992 WL 130567 (W.Va. June 12, 1992).

There is no dispute that the evidence of punitive damages was sufficient. Even if Petitioner's arguments had merit, it was not denied the opportunity to make those arguments and to present relevant evidence to the jury and to the trial court. In short, having declined the

opportunity to introduce evidence that it had been punished enough by prior verdicts, Petitioner cannot seek to rectify its own failures at trial in this Court.

Not only do the punitive damages awarded against Petitioner comport with relevant state law, the process by which those damages were assessed and reviewed satisfy the demands of procedural due process. The charge to the jury explained the purposes of punitive damages under West Virginia law and instructed the jury on all relevant factors for which evidence had been introduced. The post verdict review process provided Petitioner the opportunity to argue the propriety of the punitive damage awards and to present additional evidence. The Petition for Appeal to the West Virginia Supreme Court was far from perfunctory, and involved extensive briefing and the opportunity for oral argument on the issue.

In short, punitive damage awards of $5,000 per plaintiff in a case where compensatory damages ranged from $15,000 to $324,000 raises neither substantive nor procedural due process problems, and this Court should deny the Petition for a Writ of Certiorari.

ARGUMENT

I. The Propriety Of Multiple Punitive Damage Awards Against A Defendant Who For Years After Knowledge Of The Defect Mass Markets Defective Products Is A Matter Of State Substantive Law.

Buried on page 43 of Keene's Petition for a Writ of Certiorari is the sole basis on which Keene urges this Court to accept review: "the mere fact that Keene was

assessed punitive damages twenty-one times in the same trial for the same course of conduct violates Keene's due process rights." This argument repeatedly has been raised in asbestos cases appealed to this Court, which has properly denied review. *See, e.g., Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied sub nom. Celotex Corp. v. Glasscock*, 112 S. Ct. 1778 (1992); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied sub nom. Celotex Corp. v. King*, 111 S. Ct. 2236 (1991); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir.), *cert. denied sub nom. Pittsburgh Corning Corp. v. Simpson*, 111 S. Ct. 27 (1990); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied sub nom. Celotex Corp. v. Johnson*, 111 S. Ct. 297 (1990); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986).

Punitive damages have long been a part of traditional state tort law. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1041 (1991); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Although defendants have mounted repeated federal attacks on this aspect of state law, these attempts have been firmly rejected by this Court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259-60 (1989) (Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awarded in civil cases between private parties); *United States v. Halper*, 490 U.S. 435, 450-51 (1989) (Double Jeopardy Clause of Fifth Amendment is not triggered by civil litigation between private parties). The awards of punitive damages in these tort cases under state law further the purposes of punitive damages under a long line of

West Virginia appellate cases, and this Court need not address Keene's objection raised in its Petition for a Writ of Certiorari.

A. The Awards Of Punitive Damages In These Cases Furthered The Purposes Of Punitive Damages Under West Virginia Law.

Haslip reaffirmed the longstanding principle expressed in *Silkwood* that punitive damages are a part of traditional state tort law. The Court described at length the case law upholding the well-established common law method for assessing punitive damages, and recognized that the Fourteenth Amendment to the Constitution was not intended to overturn the prevailing method. *Haslip*, 111 S. Ct. at 1043 (citing *Burnham v. Superior Court of California*, 495 U.S. 604 (1990); *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 181 (1852)).

Refusing to "draw a mathematical bright line between the constitutionally unacceptable that would fit every case," the Court reviewed the process by which punitive damages were assessed by the jury in the case before it, the post-trial procedures for scrutinizing punitive awards and the review provided by the Alabama Supreme Court, and rejected Pacific Mutual's challenge under the Due Process Clause of the Fourteenth Amendment.

In reviewing the jury's assessment of punitive damages against Pacific Mutual, Justice Blackmun did not require that punitive damages serve a particular purpose. Rather, he recognized the purposes of punitive damages under Alabama law. Because the jury instructions in

Haslip expressly described the nature and purpose of punitive damages under the relevant State law, identified the damages as punishment for civil wrongdoing and explained that their imposition was not compulsory, the instructions reasonably accommodated Pacific Mutual's interest in rational decision making and the state's interest in meaningful individualized assessment. Since the jury exercised its discretion with reasonable constraints, due process was satisfied. *Haslip*, 111 S. Ct. at 1044.

The Court also concluded that the trial court's scrutiny of the award post-trial, considering factors such as the culpability of the defendant's conduct,the desirability of discouraging others from similar conduct, the impact upon the parties and the impact on innocent third parties, ensured meaningful and adequate review by the trial court. *Id.*

The Court further regarded appellate review as providing an additional check on the jury's or trial court's discretion. Recounting the factors that the Alabama Supreme Court considers in determining whether the award was excessive or inadequate, the Court concluded that appellate review makes certain that punitive damages are reasonable in their amount and rational in light of their purpose. In particular, the Court regarded the appellate court's post-verdict review as ensuring that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages.

Thus, it was important to the Court's conclusion in *Haslip* that the award furthered the purposes of punitive damages as described in the decisional law of the state.

The purposes of punitive damages under West Virginia Law were recently described by the Supreme Court of Appeals of West Virginia in *Fleming Landfill v. Garnes*, 186 W. Va. 656, 413 S.E.2d 897 (1991), on remand from *Fleming Landfill v. Garnes*, 111 S. Ct. 2882 (1991). In *Garnes* the West Virginia Court, like this Court, recognized the longstanding history of punitive damage awards and noted that no one (except perhaps a few academic commentators) questions the value of punitive damages as a deterrent to discourage bad acts, as an economic incentive to exercise greater care, and as encouraging good faith efforts at settlement.

Approximately six months later, the West Virginia Supreme Court reviewed a punitive damage award against an asbestos defendant in another case before one of the trial judges who presided at the cases below. In *Davis v. Celotex Corp.*, 1992 WL 130567 (W. Va. June 12, 1992), the Court in a written opinion rejected precisely the same issues raised by Keene.

In *Davis*, the Court amplified the reasons for awarding punitive damages expressed in *Garnes*: "(1) to punish the Defendant; (2) to deter others from pursuing a similar course; and (3) to provide additional compensation for the egregious conduct to which the Plaintiff has been subjected." *Davis*, 1992 WL 130567 at *2 (quoting *Harless v. First National Bank in Fairmont*, 169 W. Va. 673, 691, 289 S.E.2d 692, 702 (1982), and citing *Jarvis v. Modern Woodmen of America*, 185 W. Va. 305, 406 S.E.2d 736 (1991)). In addition, the possibility of recovering punitive damages can encourage a plaintiff to bring an action where he might be discouraged by the costs and inconvenience of the action and can also serve as a substitute for personal

revenge. *Davis*, 1992 WL 130567 at *2. The Court concluded that when an asbestos manufacturer has actual or constructive knowledge of the severe health hazards caused by a product and continues to manufacture and distribute that product, the manufacturer may be found liable for punitive damages to those injured by the product. *Id.* at *4. The Court also held that a successor corporation may be found liable for punitive damages for liability incurred by the predecessor company in its manufacture of defective products. *Id.* at *7.

Of particular interest to the instant Petition is the *Davis* Court's discussion of the defendant's argument that multiple punitive damage awards are fundamentally unfair under the Due Process Clause. The Court refused to decide the question as a matter of law. Noting that the defendant failed to present its concerns to the jury by introducing evidence of the prior punitive damage awards and arguing that it had been sufficiently punished, the West Virginia Court concluded that when the record fails to set out sufficient facts to answer the question of whether substantive due process has been violated by multiple punitive damage awards in asbestos cases, the Court will decline to address the issue.

When held against the backdrop of West Virginia law, it is clear that the punitive damages awarded against Keene further the purposes of such awards under West Virginia law. Keene profited from the mass-marketing of its asbestos-containing products which tragically caused injury and death to thousands of individuals, including the Plaintiffs.

Multiple punitive damage awards serve to encourage manufacturers to take steps to make their products safer and deter manufacturers from factoring the cost of a single punitive damage award into the cost of its product and accepting the risk of marketing a product paying limited punitive damages. If only a single punitive damage award were permitted, such assessment would occur before the full extent of the threat of harm caused by wrongdoer were known.

Punitives are particularly important in asbestos cases involving multiple defendants to encourage good faith efforts at settlement. Defendants' wrongful conduct continued for many years after knowledge of the defect and injured many victims. Nonetheless, many of the compensatory damage awards against Keene were offset by settlements with other defendants in accordance with *Board of Education v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 390 S.E.2d 796 (1990). There are no offsets against punitives. If there were no punitive damage awards, defendants who refused to settle might never be required to pay for the harm caused by their defective products.[1]

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[1] Footnotes 10-11 of Keene's Petition misrepresent the state of the law regarding punitive damages. Although some courts have expressed concerns from time to time, Keene cites no case that has ever held that multiple awards of punitive damages violate due process. Indeed, *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967), *limited in Morrissey v. National Maritime Union of America*, 544 F.2d 19 (2d Cir. 1976), cited by Keene, reversed the award of punitive damages not because of the reasons set forth in Footnote 10, but because there was insufficient evidence of misconduct, a problem not present in the instant case. Further, the court that decided *Roginsky* recently rejected the same challenges to an award of punitive damages in

In the criminal context, West Virginia has recognized that when a single act results in multiple deaths, Article III, Section 5 of the West Virginia Constitution permits multiple punishments, and criminal defendants may receive as many sentences as there were deaths. *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812, 826 (1989); *State ex rel. Lehman v. Strickler*, 174 W. Va. 809, 329 S.E.2d 882 (1985); *State v. Myers*, 171 W. Va. 277, 298 S.E.2d 813 (1982). Certainly in the civil context, when a manufacturer's product causes death and injury to many people, multiple punitive damage awards are proper.

Thus, the West Virginia Supreme Court has held that multiple punitive damages are proper in precisely the

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an asbestos case as Keene raises. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d at 280-81; *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990); *Racich v. Celotex Corp.*, 887 F.2d 393 (2d Cir. 1989). It would be unjust to deny a plaintiff's legitimate claim for punitive damages merely because many others were also injured by a defendant's product. In fact, the more individuals a tortfeasor injures by outrageous conduct, the more the tortfeasor should be punished. Given the great potential for harm by widely distributed defective products, a potential that materialized in these cases, multiple punitive damage awards are justified. *Jackson*, 781 F.2d at 407.

Further, no case has ever adopted the reasoning set forth in Footnote 11 of Keene's Petition that the manufacture and distribution of asbestos-containing products was a single continuous course of conduct for which multiple awards of punitive damages are improper. Rather, many cases have held that it was *improper* to conclude that the punitive damages awarded in one case involved the same misconduct as in other cases. *See, e.g., Simpson*, 901 F.2d at 281; *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989).

same circumstances as are presented here. Indeed, the awards against Keene further the purposes of such awards under West Virginia law. Since its decision in *Haslip*, the Court has refused to review multiple punitive damage awards in asbestos cases. *See Glasscock, supra.* This Court must not interfere with the development of substantive state tort law, and must deny Keene's Petition for a Writ of Certiorari.

B. Even If Evidence Of Multiple Punitive Damage Awards Is Relevant To The Consideration Of The Jury And The Trial Court, Petitioner Was Not Denied The Opportunity To Present Evidence Of Such Awards.

Throughout its Petition for a Writ of Certiorari, Keene suggests that it has insufficient assets to pay multiple punitive damage awards, and cites law review articles, general periodical literature, studies by the Rand Corporation Institute for Civil Justice and the American Trial Lawyers Association and a host of "facts" from sources not in the trial court record.

West Virginia has a mechanism for addressing these concerns. In *Garnes*, the West Virginia Supreme Court advanced the three general criteria for awards of punitive damages expressed by this Court in *Haslip*:

> (1) a reasonable constraint on the jury's discretion; (2) a meaningful and adequate review of the award by the trial court using established procedures; and (3) a meaningful and adequate review by the appellate court.

Garnes, 413 S.E.2d at 907.

More specifically, the West Virginia court stated that the jury ought to consider the factors set forth in *Haslip*, 111 S. Ct. at 1045, but recognized that all of the factors need not be given to the jury because the jury will not possess all of the information necessary to use the factors properly. *Garnes*, 413 S.E.2d at 909. Briefly, these factors are: (1) punitive damages should bear a reasonable relationship to the harm that occurred or is likely to occur; (2) the reprehensibility of the defendant's conduct; (3) the profitability of defendant's wrongful conduct; (4) punitive damages should bear a reasonable relationship to compensatory damages; and (5) the financial position of the defendant. *Id.* In *Garnes*, the Court reversed the award of punitive damages because the jury awarded punitives without finding any compensatory damages, contrary to factors (1) and (4). *Id.* at 908.

Garnes also described the trial court's role post-verdict. The trial court's review of an award of punitive damages should consider all of the *Haslip* standards and, in addition, should consider the appropriateness of punitive damages to encourage fair and reasonable settlements. *Garnes*, 413 S.E.2d at 908.

The West Virginia Court also confirmed its role on appellate review:

> Upon petition, this Court will review all punitive damage awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the

> trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

Syllabus Point 5, *Garnes*, 413 S.E.2d at 900, 910. The role of the appellate court was reiterated in *Davis v. Celotex*, 1992 WL 130567 at *10.

Although *Garnes* and *Davis* were decided prior to the trial of these cases, Keene has failed to demonstrate that the procedures described in those cases were not followed. For example, Keene does not complain that it was deprived of the opportunity to present evidence of other punitive damage awards or of its financial condition to the jury. If the trial courts did not instruct the juries on these factors, it was because the jury did not possess information necessary to use the factors properly because Keene did not offer such information. Keene filed post trial motions, and the West Virginia Supreme Court reviewed the awards on Keene's Petition for Appeal. The Petition for Appeal did not address each and every factor with particularity nor did it summarize its evidence on these factors, because there was none. Unlike *Garnes*, in which no compensatory damages were awarded, the punitives awarded against Keene were a small fraction of the compensatory damages. Therefore, the West Virginia Supreme Court found no basis to review the case and refused Keene's Petition for Appeal.

Keene awaits its Petition for Writ of Certiorari in this Court to present information (which is *not* even in the form of admissible evidence) that it wished the jury to consider in mitigation of punitive damages. Federal courts have properly rejected this tactic. A party who has

failed to avail itself of the opportunity to present relevant evidence cannot seek to rectify its own failure in the appellate court. *See, e.g., Simpson v. Pittsburgh Corning Corp.*, 901 F.2d at 280-82; *Dunn v. Owens-Corning Fiberglas*, 774 F. Supp. 929, 946 (D.V.I. 1991).

C. Multiple Punitive Damages Do Not Violate Due Process In These Cases.

The jury's award of multiple punitive damages awards against Keene was proper under West Virginia substantive law. Although the argument has been repeatedly raised, no court has ever held that such awards violate substantive due process. *See, e.g., Simpson, supra; Johnson, supra; Racich v. Celotex Corp.*, 887 F.2d 393 (2d Cir. 1989). The reasons are simple: it would be unjust to deny a plaintiff's legitimate claim for punitive damages merely because many others were also injured by a defendant's product. Given the great potential for harm by widely distributed defective products, a potential that materialized in these cases, multiple punitive damage awards are justified. *Jackson*, 781 F.2d at 407. Accordingly, all federal courts that have considered the question have held that it is *improper* to conclude that the punitive damages awarded in one case involved the same misconduct as in other cases. *See, e.g., Simpson*, 901 F.2d at 281; *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989).

A total punitive damage award of $105,000 divided among 21 plaintiffs (many of whom were awarded large compensatory damage awards that Keene did not pay due to the Plaintiffs' fortuitous settlements with others)

comports with West Virginia law and does not raise any substantive constitutional problems. This Court has properly refused to entertain objections to punitive damage awards based on vague appeals to constitutional principles, *see Bankers Life & Casualty Co. v. Crenshaw, supra,* and should do so in these cases.

II. The Post Trial And Appellate Review In These Cases Satisfied The Demands Of Due Process.

As discussed above, this Court in *Haslip* held that the jury instructions, together with Alabama's post-trial and appellate review procedures, satisfied the demands of due process. In *Garnes* and *Davis,* the West Virginia Supreme Court clarified the role of the trial court and its own role in reviewing punitive damage awards.

Although the verdicts in the instant cases were rendered prior to the decisions in *Haslip* and *Garnes,* the proceedings below followed the procedures and standards clarified in those decisions.

The courts' instructions, set forth in the Statement of the Case, placed reasonable constraints on the jury's discretion and did precisely what this Court held would satisfy due process in *Haslip.* The trial courts instructed the juries that the purpose of punitive damage is to punish a defendant and deter others from pursuing a like course of conduct. Further, the instruction made clear that punitive damages were to punish the defendant for "gross fraud, malice, oppression, or wanton, willful or reckless misconduct or criminal indifference to the civil

obligations affecting the rights of others." The instructions also explained that the imposition of punitive damages is not compulsory.

Thus, there was no significant difference between the instructions given here and the one approved by the Supreme Court in *Haslip*. The instructions confined the jury's discretion to deterrence and retribution, the West Virginia policy concerns. The instructions did not specifically describe certain factors, such as the profitability to Defendants of their wrongful conduct, Defendants' financial position or the costs of litigation. However, Keene did not offer evidence of these factors, and were not denied the opportunity to do so. In fact, evidence of these factors would likely have prejudiced Keene, and under such circumstances, the trial court would have been obligated to keep such evidence from the jury.

Further, as concluded by the Court in *Davis*:

> In sum, we hold that in cases tried before *Garnes* in which punitive damages were awarded, we will not set aside such awards if there is a factual basis for the punitive damages, if the punitive damages bear a reasonable relationship to the compensatory damages, and if the parties' main assignment of error is that the trial court's instruction did not contain all of the factors enunciated in *Garnes*.

Davis, 1992 WL 130567 at *10.

Thus, the mere fact that the trial court's instruction did not contain all of the *Garnes* language did not amount to a denial of due process. Given that Keene's conduct was egregious enough to impose punitive damages and the ratio between the compensatory and punitive damage

awards is not unreasonable, the Court declined to set aside the award. The jury was capable of accommodating Keene's interest in rational decision making and the state's interest in meaningful, individualized assessment in that the jury differentiated between the egregiousness of Keene's conduct and the other defendants who went to verdict, and awarded punitive damages in different amounts. The "across-the-board" damages awarded against Keene were reasonable because Keene's misconduct was similar, although often repeated, with respect to all Plaintiffs who were injured by Keene's products. The punitives of $5,000 per Plaintiff were less than any compensatory damage award and bear a reasonable relationship to the serious harm caused.

The fact that the jury in Judge Stone's courtroom awarded no punitives against Keene does not implicate any due process concerns. There is nothing precise in a jury determination of damages, and the unpredictability of litigation encourages good faith efforts at settlement, an important reason that the West Virginia courts maintain the viability of punitive damages. *See Garnes*, 413 S.E.2d at 904. In fact, to reverse the award of punitive damages would send the wrong message. Keene refused to settle its cases, and the compensatory damages awarded against it were, in many cases, offset by Plaintiffs' settlements with other defendants. To reverse the punitive damage award against a wrongdoer who is not required to pay compensatory damages due to fortuitous settlements with others would discourage settlements in multiple defendant cases.

The review by the trial courts was also adequate and meaningful. Keene submitted post-trial motions that

forced the trial courts to consider a number of factors, such as the relationship between the compensatory and punitive damages and the possibility of multiple punitive damage awards. Keene was free to argue the applicability of such relevant standards and to present evidence on them, but having failed to avail itself of the opportunity, cannot complain of its own failure to this Court.

The Petition for Appeal to the West Virginia Supreme Court provided the "additional check" on the discretion of the jury and trial court deemed important by this Court in *Haslip*. The parties presented substantial briefs to the appellate court, and Keene, but not the Plaintiffs, had the opportunity to present oral argument. *Davis* makes clear that the West Virginia Supreme Court will allow an appeal that raises issues warranting closer scrutiny. However, the West Virginia Supreme Court refused the petition for appeal in the instant case because it correctly concluded that Keene presented no issue that required further review.

To require an appellate court to automatically review all cases awarding punitive damages, as Keene suggests, would discourage settlements and increase the cost of litigation, contrary to the purpose of such awards. Thus, the West Virginia Supreme Court's refusal to prolong the litigation process was in keeping with the important public policies recognized in its case law.

CONCLUSION

The multiple punitive damages awarded against the product manufacturer in these cases further the purposes of punitive damages under applicable state law. Petitioner had every opportunity to introduce relevant evidence. The state trial and appellate courts provided adequate and meaningful review. The punitive damages awarded against Petitioner comport with the demands of due process, and this Court must deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: September 14, 1992

RULES OF APPELLATE PROCEDURE WEST VIRGINIA SUPREME COURT OF APPEALS

Rule 3. Petition for Appeal. (a) *Time for Petition.* No petition shall be presented for an appeal from, or a writ of supersedeas to, any judgment, decree or order, which shall have been rendered more than four months before such petition is filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered, whether the State be a party thereto or not; provided, that the judge of the circuit court may for good cause shown, by order entered of record prior to the expiration of such period of four months, extend and re-extend such period, not to exceed a total extension of two months, if a request for the transcript was made by the party seeking an appeal or supersedeas within thirty days of the entry of such judgment, decree or order. In appeals from administrative agencies, the petition for appeal shall be filed within the applicable time provided by the statute.

(b) *Notice for Criminal Appeal.* No petition from a criminal case shall be presented unless a notice of intent to appeal shall have been filed with the clerk of the court in which the judgment or order was entered within thirty days from the entry of such judgment or order. The notice of intent to appeal shall concisely state the grounds for appeal.

(c) *Form of Petition.* The petition for appeal and note of argument under prior practice shall be integrated into one document called the petition. A petition for an appeal shall state the following in the order indicated:

1. The kind of proceeding and nature of the ruling in the lower tribunal.

2. A statement of facts of the case.

3. The assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal.

4. Points and authorities relied upon, a discussion of law, and the relief prayed for.

(d) *Joint or Consolidated Appeals.* If two or more persons are entitled to appeal from a judgment or order of a lower tribunal and their interests are such that joinder may properly be made, they may join in petitioning for an appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Supreme Court upon its own motion, or upon motion of a party, or by stipulation of the parties to the several appeals.

(e) *Service of Petition.* The petition for appeal shall be served in accordance with Rule 15.

(f) *Response to Petition.* When the appeal is from a judgment, order or decree of a circuit court, the respondent may file seven copies of a response with the Clerk of the Supreme Court within thirty days after the filing of the petition for appeal in the office of the clerk of the circuit court. When the appeal is from another tribunal, the respondent may file seven copies of a response with the Clerk of the Supreme Court within thirty days after the filing of the petition for appeal with the Clerk of the Supreme Court. (As amended by order entered November 29, 1989, effective January 1, 1990, by order entered

June 26, 1990, effective July 1, 1990, and by order entered December 13, 1990, effective March 1, 1991.)

Rule 4. Presentation of Petition. (a) *Filing with Clerk.* When the appeal is from an order of the circuit court, eight copies of the petition for appeal shall be filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered. The circuit clerk shall note on each copy the date on which the petition for appeal was filed. There shall be attached to the original petition a memorandum of all parties who have appeared in the action from which the appeal is sought, together with the names and addresses of their counsel of record, if any.

(b) *Transmission to the Supreme Court.* The circuit clerk shall retain one copy of the petition and, within twenty days from deposit of money or bond for costs under subparagraph (d), shall transmit seven copies of the petition, along with the trial court record as designated in paragraph (c), to the Clerk of the Supreme Court by United States certified mail.

(c) *Record on Petition.* The appellant shall designate by itemization to the clerk of the circuit court such pleadings, orders and exhibits to enable the Supreme Court to decide the matters arising in the petition:

(i) In lieu of filing all or part of the transcript of testimony the petitioner may file under Rule 4A, in which event he may rely on the facts stated in his petition, or

(ii) If the petitioner desires he may cause to be prepared, pursuant to the provisions of Rule 80 of the West Virginia Rules of Civil Procedure, a transcript of such part of the proceedings not already on file as he deems necessary for inclusion in the record.

The circuit clerk, before transmitting the record to the Supreme Court, shall arrange the papers, as nearly as possible, in chronological order of filing, shall number the pages, shall make and certify copies of all orders entered in the case which are not in the files, and shall prepare a table of contents or index.

(d) *Bond for Costs.* Before such petition and record are transmitted, the petitioner shall deposit with the clerk of the circuit court sufficient money, or a bond conditioned to pay the same, in a penalty and with sureties to be fixed and approved by such clerk, to pay: (1) the expenses of preparing and indexing the record; (2) fees for filing the petition and certifying necessary copies of orders; (3) costs of transmission and return of the record; and (4) costs of the making of the transcript. The clerk shall endorse on the petition that such deposit has been made or such bond fixed. (As amended by order entered November 29, 1989, effective January 1, 1990.)

Rule 4A. Presentation of Petition Without Transcript of Testimony. (a) *Purpose.* In order to provide an inexpensive and expeditious method of appeal, a petitioner may file his petition without the transcript of testimony taken in the lower court.

(b) *Filing with Circuit Court.* Eight copies of the petition shall be filed in the office of the clerk of the circuit where the judgment or order being appealed was entered within sixty days from the date of entry of the judgment of order. Two additional copies of the petition shall be served upon each party to the action being appealed, as provided in Rule 15, and such parties shall have thirty days to file a reply petition with the clerk of the circuit court. The respondent shall not be entitled to an oral argument under rule 5.

(c) *Record on Petition.* The petitioner shall designate by itemization to the clerk of the circuit court so much of the pleadings, orders and exhibits in the case as will enable the Supreme Court to decide the matters arising in the petition. In lieu of filing all or part of the transcript of testimony, the petitioner shall set out in the petition a statement of all facts pertinent to the issues he raises. The petition shall include a certificate by the petitioner's attorney that the facts alleged are faithfully represented and that they are accurately presented to the best of his ability. The use of the abbreviated procedure, set forth in this Rule 4A, places the highest possible fiduciary duty upon a lawyer with regard to the court and intentional misrepresentation of any sort is grounds for disciplinary action.

(d) *Transmission to the Supreme Court.* The circuit clerk shall retain in his office one copy of the petition. He shall, at the end of thirty days from the date the petition was filed under paragraph (b), supra, or after respondent has filed a reply petition, whichever occurs first, transmit by certified mail to the Clerk of the Supreme Court seven

copies of the petition. The circuit clerk, before transmitting the record to the Supreme Court, shall arrange the papers, as nearly as possible, in chronological order of filing, shall number the pages, shall make and certify copies of all orders entered in the case which are not in the files, and shall prepare a table of contents or index.

(e) *Bond for Costs.* Before such petition and record are transmitted to the Supreme Court, the petitioner shall deposit with the clerk of the circuit court sufficient money, or a bond conditioned to pay the same, in a penalty and with sureties to be fixed and approved by such clerk, to pay: (1) the expenses of preparing and indexing the record; (2) fees for filing the petition and certifying necessary copies of orders; (3) costs of transmission and return of the record. The clerk shall endorse on the petition that such deposit has been made or such bond filed.

Rule 5. Hearing on Petition. (a) *Time for Hearing.* Within thirty days from the date of receipt of the petition and record by the Clerk of the Supreme Court, counsel may request oral presentation on the petition on any regularly scheduled motion day thereafter. Such request shall be made to the Clerk of the Supreme Court in writing or by telephone. Oral presentation will be heard in the order in which such requests were made. Oral presentation will not be heard, except upon motion for good cause shown, prior to expiration of the period allowed for filing a response as provided in Rule 3(f).

(b) *Oral Presentation.* Oral presentation shall be limited to ten minutes, unless additional time is granted by the Court.

(c) *Waiver of Oral Presentation.* At any time after the transmission of the petition and record to the Clerk of the Supreme Court in accordance with Rule 4A(d), counsel may inform the Clerk in writing that an oral presentation is not desired, in which case the petition will be considered by the Court in chambers. (As amended by order entered December 13, 1990, effective March 1, 1991.)

* * *

Rule 7. Rejection or Allowance of Appeal. (a) *Rejection.* If the petition for appeal is rejected by the Supreme Court on the ground that the judgment or order is plainly right, no other petition for appeal from that judgment or order shall be permitted. If the petition for appeal is rejected on any other ground, or if no ground be cited in the rejection, the petitioner may renew the petition as many times as he desires during the period prescribed by law for presentation of petitions.

(b) *Renewal of Petition.* A petitioner desiring to renew a petition may notify the Clerk of the Supreme Court of his intention in writing within thirty days after the entry of the order denying his application. In such case, the Clerk shall retain the petition and record in the Supreme Court, the petition may be reheard in accordance with Rule 5, and an amended petition or supplemental argument may be filed.

If the Clerk of the Supreme Court receives no timely notice of the petitioner's intention to renew, he shall return the record to the circuit clerk, who shall repay the petitioner any money deposited under Rule 4(d) or Rule 4A(e), in excess of fees and expenses.

(c) *Allowance.* If the petition for appeal is granted:

(1) The Clerk of the Supreme Court shall docket the same and immediately send a copy of the order granting the appeal to the petitioner's counsel, or, if there is no counsel of record, to the petitioner, and to the clerk of the circuit court, who shall retain the same in his records.

(2) The Clerk of the Supreme Court shall forthwith return the record to the clerk of the circuit court for preparation of the record of the case for appeal in accordance with Rules 8 and 9.

(3) The Clerk of the Supreme Court shall then issue summons against all parties appearing of record, other than the petitioner, that they may be heard, and shall also issue any supersedeas which may have been awarded. The Clerk of the Supreme Court shall serve the summons upon the parties by mailing the same to the counsel of record for each party, or if there is no counsel of record, to the party at his last known address. Service shall be complete upon mailing. The Clerk of the Supreme Court shall note upon the docket the names of the parties to whom the summonses were mailed, with the date of mailing.

(4) The Court may grant a supersedeas or modify the conditions thereof, in accordance with rule 6.